UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA	***)***	
	)	
v.	***)***	***Criminal Docket No. 91-72-P-H***
	)	***(Civil Docket No. 96-380-P-H)***
PATRICK W. TRACY,	***)***	
	)	
Defendant	***)***	

PROCEDURAL ORDER AND RECOMMENDED DECISION ON DEFENDANT'S MOTION FOR RELIEF FROM ORDER AND/OR FOR WRIT OF CORAM NOBIS

Defendant Patrick W. Tracy has filed with the court a second motion for collateral relief pursuant to 28 U.S.C. § 2255 in connection with his conviction of being a felon in possession of a firearm in violation of 28 U.S.C. § 922(g)(1). Sentenced as a career criminal pursuant to 18 U.S.C. § 924(e)(1), he now seeks to challenge that determination in light of two recent First Circuit cases, *United States v. Caron*, 77 F.3d 1 (1st Cir.) (en banc), *cert. denied*, 116 S.Ct. 2569 (1996), and *United States v. Indelicato*, 97 F.3d 627 (1st Cir. 1996), *cert. denied*, 65 U.S.L.W. 3571 (Feb. 18, 1997), both decided after the defendant filed his first motion for collateral relief. For the reasons that follow, the defendant's section 2255 motion must be stricken. He also seeks relief pursuant to Fed. R. Civ. P. 60(b) and/or a writ of *coram nobis*. I recommend denial of this request.

I. Antiterrorism and Effective Death Penalty Act

The defendant's initial motion raised other issues and was denied by this court, Order Affirming Recommended Decision of the Magistrate Judge (Docket No. 78), a determination

affirmed on appeal, *United States v. Tracy*, 81 F.3d 147 (1st Cir. 1996) (table).[1] The implacable reality, as the defendant concedes, is that the court is unable to entertain the defendant's second motion. Pursuant to the amendments made to section 2255 and 28 U.S.C. § 2244 by the Antiterrorism and Effective Death Penalty Act of 1996 ("Antiterrorism Act"), Pub. L. No. 104-132, §§ 105-06, 110 Stat. 1220-21 (Apr. 24, 1996), before a second or successive request for collateral relief may be filed in this court, the movant must seek an order from the First Circuit Court of Appeals in Boston authorizing this court to consider the motion.

Moreover, and as the defendant further concedes, it does not appear that the instant motion satisfies the criteria in the Antiterrorism Act for the granting of such an authorization by the appeals court. In relevant part, the Act requires the dismissal of a new claim, presented in a second or subsequent request for collateral relief, unless the claim "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." *Id*. at § 106, amending 28 U.S.C. § 2244(b). *Caron* and *Indelicato* do not set forth a new rule of constitutional law -- they turn on an issue of statutory interpretation -- and do not state a principal made retroactive to cases on collateral review by the Supreme Court.

Prior to the Antiterrorism Act, there may have been grounds for affording the defendant section 2255 relief. The defendant was originally sentenced as a career criminal as a result of predicate state-law convictions from Massachusetts -- one being an assault on a police officer. Government's Sentencing Memorandum (Docket No. 53) at 7-8. By statute, "[a]ny conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil

[1] The First Circuit's unpublished *per curiam* opinion appears in the record as Docket No. 82.

rights restored" cannot serve as a predicate conviction for career criminal purposes "unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." 18 U.S.C. § 921(a)(20). In this context, civil rights "generally encompass the right to vote, the right to seek and hold public office, and the right to serve on a jury." *United States v. Sullivan*, 98 F.3d 686, 689 (1st Cir. 1996) (citation and internal quotation marks omitted).

Prior to February 26, 1996 -- the date of the First Circuit's *Caron* decision -- it was the law in this circuit that the "civil rights restored" exception set forth in section 921(a)(20) applied only to convictions as to which there had been some "affirmative, additional step" taken as an "individualized judgment" to restore civil rights that the defendant had lost. *United States v. Ramos*, 961 F.2d 1003, 1008-09 (1st Cir. 1992). *Ramos* was good law when the defendant was sentenced in 1993, when he pursued his direct appeal on other grounds without success in 1994, *see United States v. Tracy*, 36 F.3d 187 (1st Cir. 1994), and throughout the proceedings on the defendant's initial request for collateral relief.

In *Caron*, the *en banc* panel of the First Circuit explicitly overruled the holding in *Ramos* that "individualized action" is required if a defendant's civil rights are to be deemed as having been restored within the meaning of section 921(a)(20). *Caron*, 77 F.3d at 4, 5. The court noted that a convicted felon in Massachusetts does not lose the right to vote, but is deprived of the right to hold public office while serving the sentence and is disqualified from jury service for seven years after the conviction. *Id*. at 2. Therefore, a conviction under Massachusetts law, for which the right to vote had never been deprived and for which the other two civil rights had been restored by statute of general application, was not properly considered a predicate offense. *Id*. at 6. Again dealing

with a predicate conviction arising under Massachusetts law, *Indelicato* marked yet a further step. At issue was a misdemeanor conviction, for which civil rights are not deprived at all under Massachusetts law. *Indelicato*, 97 F.3d at 631. The First Circuit held flatly that "civil rights, to the extent that they were never taken away, should be treated as 'restored' for purposes of the federal statute." *Id*.

In a recent case not cited by the defendant, the First Circuit has declared that, "to meet the test of section 921(a)(20), each of the three core 'civil rights' must be substantially, but not perfectly, restored." *United States v. Estrella*, 104 F.2d 3, 6 (1st Cir. 1997) (citations omitted) (holding that a Massachusetts conviction not a predicate offense even though state-court trial judge could still strike defendant from jury based on status as ex-felon). However, *Estrella* also took up an aspect of section 921(a)(20) not previously discussed -- its specific exemption for career criminal purposes of any "restoration of civil rights [which] expressly provides that the person may not ship, transport, possess, or receive firearms." Noting that Massachusetts law prohibits handgun possession by ex-felons outside their homes or businesses, the court found in this provision "a substantial enough limit on firearms rights" such that "an ordinary Massachusetts felon will not be exempted from the federal ban." *Id*. at 8.

The offenses deemed to be predicate convictions in the instant case were all more than seven years old at the time of the 1991 events that led to the defendant's federal prosecution. The government does not address the defendant's assertion in his second motion for collateral relief that at least two of the offenses were not properly considered predicate convictions in light of *Caron* and *Indelicato*. It would appear, although I need not and therefore do not so determine, that the holding from *Estrella*, concerning the felon's right to possess firearms, would be inapplicable because the

defendant's conviction for assaulting a police officer was a misdemeanor under Massachusetts law. *See Indelicato*, 97 F.3d at 629 (misdemeanants in Massachusetts do not lose section 921(a)(20) civil rights); Mass. Gen. Laws ch. 265, § 13D (assault and battery upon public employee punishable by up to two and a half years in a "house of correction"); Mass Gen. Laws ch. 274, § 1 (defining misdemeanor as crime not punishable by death or sentence to "state prison"); *see generally Commonwealth v. Zawatasky*, 670 N.E.2d 969, 972 (Mass. App. 1996) (discussing difference between felonies and misdemeanors in Massachusetts law). Were he to be sentenced today, *Caron* and *Indelicato* would likely foreclose his being treated as a career criminal.

II. Motion for Other Relief

Arguing forcefully that an injustice is therefore done by allowing his sentence to stand, but finding the door to the courthouse shut by operation of the Antiterrorism Act, the defendant invites the court to take extraordinary action. Specifically, he invokes Fed. R. Civ. P. 60(b) to allow him to include his *Caron/Indelicato* argument as an "amendment to his initial § 2255 filing." Motion to Amend or for Writ of Coram Nobis (Docket No. 88) at 3-4. He also asks the court to issue a writ of *coram nobis*, thereby skirting the collateral relief mechanism of section 2255 altogether and thus the effects of the Antiterrorism Act. I take up the defendant's requests in reverse order.

a. *Coram Nobis*

The unusual writ requested by the defendant is, in essence, a function of the court's ultimate authority as a last resort to correct an injustice occasioned by a criminal proceeding. But even that authority is not boundless. "Since [a] motion in the nature of the ancient writ of *coram nobis* is not specifically authorized by any statute enacted by Congress, the power to grant such relief, if it exists,

must come from the all-writs section of the Judicial Code."[2] *United States v. Morgan*, 346 U.S. 502, 506 (1954).

> [T]he All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute. Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling.

Carlisle v. United States, 116 S.Ct. 1460, 1467 (1996) (quoting *Pennsylvania Bureau of Correction v. United States Marshals Serv.*, 474 U.S. 34, 43 (1985)). Moreover, the writ of *coram nobis* is an "unusual legal animal that courts will use to set aside a criminal judgment of conviction only 'under circumstances compelling such action to achieve justice.'" *Hager v. United States*, 993 F.2d 4, 5 (1st Cir. 1993) (quoting *Morgan*, 346 U.S. at 511).

The Supreme Court's recent decision in *Carlisle* offers an excellent illustration of why a writ of *coram nobis* is not an appropriate remedy in these circumstances. The issue in *Carlisle* was whether the trial court could grant a post-verdict motion for judgment of acquittal when the motion was filed one day after the time period specified in Fed. R. Crim. P. 29(c). *Carlisle*, 116 S.Ct. at 1462. The Court's answer was that

> [t]here is simply no room in the text of Rules 29 and 45(b) [providing for relief from such a missed deadline on a showing of excusable neglect] for the granting of an untimely postverdict motion for judgment of acquittal, regardless of whether the motion is accompanied by a claim of legal innocence, is filed before sentencing, or was filed late because of attorney error.

Id. at 1464. In so holding, the Court summarily rejected the petitioner's argument that a writ of *coram nobis* would lie because "Rule 29 provides the applicable law." *Id*. at 1468. The Court also

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[2] Presently codified as 28 U.S.C. § 1651, the so-called All Writs Act provides in relevant part that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a).

restated its prior observation that, in light of the enactment of the Federal Rules of Criminal Procedure, "it is difficult to conceive of a situation in a federal criminal case today where [a writ of *coram nobis*] would be necessary or appropriate." *Id*. (quoting *United States v. Smith*, 331 U.S. 469, 475 n.4 (1947)).

In the present case, sections 2244 and 2255 -- as amended by the Antiterrorism Act -- provide the applicable law, specifically addressing the issue at hand in a manner so unambiguous as to foreclose any real discussion of whether Congress intended to deny a second bid for collateral relief in this situation. "The new restrictions on successive petitions constitute a modified res judicata rule, a restraint on what is called in habeas corpus practice 'abuse of the writ.'" *Felker v. Turpin*, 116 S.Ct. 2333, 2340 (1996) (holding that Antiterrorism Act not an unconstitutional "suspension" of habeas corpus writ). In other words, Congress intended to introduce a strict concept of finality into the law of federal post-conviction proceedings. While that concept may strike some as rigid to the point of unfairness, absent a constitutional claim not made here Congress may properly limit the rights it created by section 2255 and the All Writs Act. Forty-three years ago, when section 2255 permitted a federal prisoner in actual custody to move for post-conviction relief at any time, the Supreme Court described the statute's purpose as addressing "'practical difficulties' in the administration of federal habeas corpus jurisdiction, rather than "cover[ing] the entire field of remedies in the nature of *coram nobis*" or otherwise "imping[ing] upon prisoners' rights of collateral attack upon their convictions." *Morgan*, 346 U.S. at 510-511 (citation omitted). While section 2255 may still be understood as not covering the entire field, *see, e.g, Hager*, 993 F.2d at 5 (describing situations in which *coram nobis* relief appropriate), *but see Carlisle, supra* at 1468 (suggesting *coram nobis* likely of no utility in modern criminal practice), the Antiterrorism Act circumscribes

a prisoner's right to collateral relief so as to render his sentence invulnerable to collateral attack in this manner.

b. Fed. R. Civ. P. 60(b)

I am therefore also unable to recommend relief pursuant to Fed. R. Civ. P. 60(b). The court may, in appropriate circumstances, apply the Federal Rules of Civil Procedure to proceedings arising under section 2255. Rule 12 of the Rules Governing Section 2255 Proceedings for the United States District Court. Rule 60(b), in turn, permits the court to relieve a party from a "final judgment, order or proceeding" for, *inter alia*, any reason not otherwise enumerated in the rule but "justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b)(6). It is this catch-all provision of Rule 60(b) that the defendant invokes.

As Rule 60(b) itself makes clear, it subsumes, for purposes of the modern era of notice pleading in civil matters, such ancient writs as that of *coram nobis. Id.* at subdivision (b) (abolishing *coram nobis* writ in civil cases and advising that "the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action"). In essence, then, there is no principled distinction to be drawn in the present context between *coram nobis* relief and any remedy the court might award under Rule 60(b).[3] To award relief pursuant to Rule 60(b) in these circumstances would be to usurp the authority of Congress.

III. Conclusion

[3] Such a conclusion is plainly also the position advanced by the government, whose memorandum in opposition to the defendant's subsidiary motion discusses the *coram nobis* issue at length but does not specifically address Rule 60(b). I reject any suggestion by the defendant that the government has waived its opposition to the request for relief under Rule 60(b).

By way of conclusion, I make one final observation. The underlying problem presented by this case in its present posture is not, as urged by the defendant, a flawed judgment. It is, if anything, a flawed statute. The First Circuit in *Caron* and *Indelicato* explicitly urges Congress to amend an improvidently drafted section 921(a)(20). *See Caron*, 77 F.2d at 6 (provision "would seem to be in need of revisiting by the Congress"); *Indelicato*, 97 F.3d at 631 ("patent" that Congress "did not appreciate the great variety and complexity of state provisions that would have to be meshed with the new federal statute or the odd results that would follow"). Moreover, as the First Circuit pointed out concerning a convicted felon-in-possession whose prior record was not dissimilar to Tracy's, "*ad hominem* but not without force" is the notion that such a defendant "is a perfect example of the kind of previously convicted criminal who ought to be barred from possessing a firearm." *Id*. at 630. In that sense, the result I recommend is hardly inequitable.

For the foregoing reasons, the defendant's motion for collateral relief pursuant to 28 U.S.C. § 2255 is **STRICKEN**, without prejudice to his right to request authorization from the First Circuit Court of Appeals for further postconviction review. Further, I recommend that the defendant's motion for *coram nobis* relief and/or relief pursuant to Fed. R. Civ. P. 60(b) be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 21st day of March, 1997.

David M. Cohen
United States Magistrate Judge